

NOV 3 1976

JOHN H. WOOD, JR., CLERK

NO. 76-485

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

RALPH VERNON FORD, M.D.,
Petitioner

v.

HARRIS COUNTY MEDICAL SOCIETY, ET AL,
Respondents

**On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Fifth Circuit**

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

O. CLAYTON LILIENSTERN
ANDREWS, KURTH, CAMPBELL
& JONES
2500 Exxon Building
Houston, Texas 77002
*Attorneys for Respondents,
Harris County Medical Society,
The Committee on Adjudication
and Medical Testimony of the
Harris County Medical Society,
and Neil D. Buie, M.D.*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
OPINIONS BELOW	1
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING WRIT	5
A. The merits of Petitioner's claim are not in issue..	5
B. Petitioner has presented no valid reason for granting writ	6
1. The considerations of Rule 19 are not met	6
2. The Petition is incorrectly presented	8
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

	Page
UNITED STATES CONSTITUTION	
Fifth Amendment	3, 7
Sixth Amendment	3, 7
Fourteenth Amendment	3, 7
STATUTES	
28 U.S.C. §1343(3)	3
42 U.S.C. §1983	3, 5, 7
RULES	
Rules of the United States Supreme Court	
Rule 19	6
Rule 23(1)(a)	8
Rule 23(d)	8

II

CASES

Page

<i>Anderson v. Louisiana Dental Assn.</i> , 372 F.Supp. 837 (M.D. La.), <i>aff'd</i> , 502 F.2d 783 (5th Cir. 1974)	5
<i>Civil Rights Cases</i> , 109 U.S. 3 (1883)	6, 7
<i>Corrigan v. Buckley</i> , 271 U.S. 323 (1926)	6, 7
<i>Ford v. Harris County Medical Society</i> , 535 F.2d 321 (5th Cir. 1976)	4
<i>Golden v. Biscayne Yacht Club</i> , 521 F.2d 344 (5th Cir. 1975)	5
<i>Greco v. Orange Memorial Hospital Corp.</i> , 513 F.2d 873 (5th Cir. 1974), <i>cert. denied</i> , 96 S.Ct. 433 (1975)	5
<i>Hormel v. Helvering</i> , 312 U.S. 552 (1940)	6
<i>International Ass'n of Machinists v. Sandsberry</i> , 277 S.W.2d 776, <i>aff'd</i> , 295 S.W. 412 (Tex. 1956), <i>cert. denied</i> , 353 U.S. 918 (1957)	7
<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345 (1974)	5, 6, 7
<i>Moose Lodge No. 107 v. Irvis</i> , 407 U.S. 163 (1972)	5
<i>Publicity Building Realty Corp. v. Hannegan</i> , 139 F.2d 583 (8th Cir. 1944)	6
<i>Shelley v. Kraemer</i> , 334 U.S. 1 (1948)	5, 6, 7
<i>Teague v. Brotherhood of Locomotive Firemen & Engineers</i> , 127 F.2d 53 (6th Cir. 1942)	7
<i>Tucker v. Dr. P. Phillips Co.</i> , 148 F.2d 904 (5th Cir. 1945)	6

NO. 76-485

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

RALPH VERNON FORD, M.D.,
Petitioner

v.

HARRIS COUNTY MEDICAL SOCIETY, ET AL,
Respondents

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Fifth Circuit

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

OPINIONS BELOW

In addition to the opinion of the United States Court of Appeals for the Fifth Circuit reported at 535 F.2d 31 (Pet. App. A), there is also an unreported Memorandum and Order and a Final Judgment entered by the United States District Court for the Southern District

of Texas. The District Court's opinion and judgment were reproduced in the appendix to Dr. Ford's appellate brief at page 128, but have not been included in his Petition for Writ of Certiorari.

QUESTION PRESENTED

Respondents, Harris County Medical Society, The Committee on Adjudication and Medical Testimony of the Harris County Medical Society and Neil D. Buie, M.D., respectfully submit that the "Questions Presented" contained in the Petition for a Writ of Certiorari do not correctly present the issue to be considered by this Court. Contrary to Dr. Ford's assertions, the only question in issue is whether the District Court was correct in dismissing Petitioner's claim for lack of subject matter jurisdiction, an action which was affirmed by the Fifth Circuit Court of Appeals.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" omits significant facts necessary to gain a correct perspective of the issue adjudicated below. Respondent therefore submits this Counter-Statement.

On January 20, 1975 an inquiry was filed with the Harris County Medical Society's Adjudication and Medical Testimony Committee concerning an alleged excessive fee charged by a Society member, Dr. Ralph Vernon Ford. On February 11, 1975 the Adjudication and Medical Testimony Committee routinely sent a letter to Dr. Ford notifying him that the matter would be discussed at the next meeting and inviting him to appear at that time. Dr. Ford, through his attorney, then sought to have the

Society's Board of Ethics consider the matter and to have counsel present at the meeting when the inquiry was considered. This request was denied in accordance with the bylaws of the Society. On March 12, 1975 Dr. Ford was again notified of the date of the meeting and again invited to be present.

On March 18, 1975, prior to the scheduled meeting date, counsel for Dr. Ford filed a petition for temporary restraining order, temporary injunction and permanent injunction in the District Court of Harris County, Texas, 127th Judicial District. A hearing on the temporary injunction was held on March 20, 1975 and an Order was entered denying the petition for temporary injunction.

Thereafter, Dr. Ford commenced this action in Federal District Court alleging denial of constitutional rights under the Fifth, Sixth and Fourteenth Amendments, seeking redress under 42 U.S.C. §1983 and 28 U.S.C. §1343 (3) and asking that the Harris County Medical Society be enjoined from conducting its hearing. (Pet. App. C). Following a conference with the Court, it was agreed by the parties that the status quo would be maintained while the Court took the case under consideration. The Harris County Medical Society then filed a motion to dismiss under Rule 12(b) for lack of subject matter jurisdiction. Subsequently, and following the submission of legal memoranda on the jurisdictional issue, a Memorandum and Order and Final Judgment were entered by the Court dismissing the action for lack of subject matter jurisdiction.

Dr. Ford then perfected his appeal to the Fifth Circuit Court of Appeals. That Court denied Dr. Ford's petition for temporary injunction pending appeal on April 6, 1976. The Court affirmed the District Court and entered judg-

ment on July 19, 1976. The Fifth Circuit Court made the following findings:

1. The Harris County Medical Society is a private, voluntary organization;
2. The Society receives no funds from the State of Texas or from any governmental agency;
3. The Society has no power to issue, suspend or revoke or otherwise affect the licensing of doctors practicing in Texas. This authority rests solely with the Texas State Board of Medical Examiners;
4. A physician does not have to belong to the Society in order to practice medicine;
5. The Society has no power or authority to enforce an order from the State Board in any proceeding;
6. The facts found by the District Court clearly indicate lack of any state involvement for §1983 purposes.

Ford v. Harris County Medical Society, 535 F.2d 321, 322 (5th Cir. 1976)

On September 20, 1976, an application was filed with this Honorable Court requesting that the Harris County Medical Society be temporarily enjoined from conducting any meetings concerning Dr. Ford pending the filing of a Petition for Writ of Certiorari. That request was denied by Mr. Justice Powell on September 22, 1976. It is from the judgment dismissing the action for lack of subject matter jurisdiction that Dr. Ford petitions for writ of certiorari.

REASONS FOR DENYING WRIT

A. The merits of Petitioner's claim are not in issue

Petitioner's statement of the questions presented is incorrect. Only Petitioner's second question, which concerns subject matter jurisdiction, is properly an issue on this Petition for Writ of Certiorari. Petitioner's first question addresses the merits of his alleged claim against the Harris County Medical Society which have neither been considered by nor adjudicated in the courts below. Pursuant to defendants' Motion to Dismiss, the District Court ordered counsel to submit further legal arguments concerning the existence of "state action" on the part of the Harris County Medical Society which would confer subject matter jurisdiction on the Court under 42 U.S.C. §1983. All subsequent memoranda and orders filed in this cause were directed only to this issue—subject matter jurisdiction. The Memorandum and Order and Final Judgment were based entirely upon the failure of Dr. Ford to demonstrate that the Harris County Medical Society was acting under color of state law, which is a necessary prerequisite to assertion of a claim under 42 U.S.C. §1983, and the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Golden v. Biscayne Yacht Club*, 521 F.2d 344 (5th Cir. 1975); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir. 1974), *cert. denied*, 96 S.Ct. 433 (1975); *Anderson v. Louisiana Dental Ass'n.*, 372 F. Supp. 837 (M.D. La.), *aff'd*, 502 F.2d 783 (5th Cir. 1974). Similarly, on appeal the only issue considered by the Court was the issue of subject matter

jurisdiction. (Pet. App. A). Having not been heard below, the merits of the case are not properly before this Court on appeal. *Hormel v. Helvering*, 312 U.S. 552, 556 (1940); *Tucker v. Dr. P. Phillips Co.*, 148 F.2d 904, 907 (5th Cir. 1945); *Publicity Building Realty Corp. v. Hannegan*, 139 F.2d 583, 587 (8th Cir. 1944).

B. Petitioner has presented no valid reason for granting the writ

1. The considerations of Rule 19 are not met

The application by Dr. Ford for writ of certiorari should be denied because no valid reason for granting review has been presented. Petitioner has not asserted any of the factors set forth in Rule 19, Rules of the Supreme Court of the United States, in support of his petition for certiorari and, in fact, none of these factors exist. There is no conflict of decision presented here nor is there an important question of federal law which has not previously been decided by this Court. To the contrary, the opinions of the courts below are entirely consistent with numerous decisions of this Court on the necessity of state action to invoke the jurisdiction of the federal courts on an issue of alleged Constitutional abridgment. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *Civil Rights Cases*, 109 U.S. 3, 11 (1883). The District Court and the Court of Appeals properly concluded that the facts presented by Dr. Ford did not establish the requisite state action.

Further, Dr. Ford has not asserted any "special or important" reasons outside those specifically enumerated

in Rule 19 in support of his petition. The question of the existence of subject matter jurisdiction is certainly not a new or novel legal issue, nor would a decision in this case add any new dimension to the law of subject matter jurisdiction. This case turns solely on the application of well-settled legal principles to the facts presented, not on an interpretation of those legal principles.

Petitioner misconstrues the content, purpose, scope and application of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. He apparently believes that subject matter jurisdiction under these amendments is different than subject matter jurisdiction under 42 U.S.C. §1983, and he appears to suggest that these amendments do not require a finding of state or governmental action and that they, in some manner, restrict purely private conduct. The first ten amendments to the United States Constitution are directed solely against federal governmental action and do not apply to action by states or private individuals. *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *International Ass'n of Machinists v. Sandsberry*, 277 S.W.2d 776, 780, *aff'd*, 295 S.W.2d 412 (Tex. 1956), *cert. denied*, 353 U.S. 918 (1957); *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 127 F.2d 53, 56 (6th Cir. 1942). Application of these amendments to the states is by incorporation through the due process clause of the Fourteenth Amendment. The Fourteenth Amendment is directed solely toward state action, and likewise has no application to purely private conduct. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Civil Rights Cases*, 109 U.S. 3, 11 (1883). To assert a cause of action and establish jurisdiction of the federal courts, a claimant must show that the alleged abridgment of his Constitu-

tional rights was caused by one acting under color of law. Petitioner has categorically failed to establish this necessary element of his action.

2. The Petition is incorrectly presented

Dr. Ford has failed to comply with several items of form in presenting his Petition. While some of these are perhaps inconsequential, such as failure to include all opinions of the Courts below as required by Supreme Court Rule 23(1)(a) and failure to state in full the text of the statutes and/or constitutional provisions relied upon as required by Supreme Court Rule 23(d), others are not.

Two matters are presented in the Petition which are not part of the record in any of the lower courts and are not related to the fee complaint against Dr. Ford by American General Insurance Company on behalf of Mrs. R. C. Platzer. The first is a letter from the Harris County Medical Society regarding a hearing to be held regarding various complaints against Dr. Ford by several other of his patients. (Pet. 8). These complaints all occurred subsequent to the commencement of this lawsuit and have not been involved in or related to this action in any manner.

The second matter is a reprint from the Journal of the American Medical Association. (Pet. App. B). It is unclear what purpose is intended by including this article, but in any event, it was not part of the record below and has no relevance to this case. Further, the cases extracted from the article and cited by Petitioner (Pet. 5) involve license revocations by state licensing agencies following criminal convictions. Such situations are clearly distin-

guishable from the action taken by a purely private association, in accordance with its bylaws, against one of its members.

CONCLUSION

The Petition fails to set forth any valid reason for granting Writ of Certiorari. The decision of the Court of Appeals does not conflict with the decisions of this Court, the decisions of other Courts of Appeals, or with any federal statute, nor is there any special or important reason for granting writ of certiorari in this action. On the contrary, both the District Court and the Court of Appeals decided the issue of subject matter jurisdiction in accordance with long-standing precedent. Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ANDREWS, KURTH, CAMPBELL
& JONES

By: O. Clayton Lilienstern
O. CLAYTON LILIENSTERN
2500 Exxon Building
Houston, Texas 77002
713 652-2412

Attorneys for Respondents

CERTIFICATE OF SERVICE

I, O Clayton Lilienstern, do hereby certify that on this the 2d day of November, 1976, three copies of the above and foregoing Brief For Respondents In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit have been mailed, Certified Mail, Return Receipt Requested, in accordance with Rule 33(3)(b), Rules of the Supreme Court of the United States, to counsel for Petitioner, Dr. Sam D. Rhem, Suite 216, Town & Country Bank Building, Houston, Texas 77024.

O. Clayton Lilienstern
O. CLAYTON LILIENSTERN